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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

BRENT H. BEEBE, Plaintiff and Appellant, v. CITY OF GALT et al., Defendants and Respondents.	C037975 (Sup.Ct.No. 98AS05748)

Plaintiff Brent H. Beebe sued the City of Galt (City) and some of its agents (collectively, defendants) claiming that they had improperly released certain criminal history information they received in connection with plaintiff's application for a gaming permit. The permit was necessary for plaintiff to continue in his employment as a gaming manager for a casino located in the City. The trial court granted defendants' motion for summary judgment and plaintiff timely filed a notice of appeal from the ensuing judgment of dismissal. We shall affirm.

PREFACE: REQUEST FOR DISMISSAL OF APPEAL

Defendants ask this court to dismiss the appeal due to irregularities in plaintiff's opening brief on appeal.

In truth, the irregularities in this case begin with the relevant complaint, which is not a model pleading. The complaint and briefing evidence a lack of understanding of the difference between a legal theory, a remedy and a cause of action. A cause of action exists for interference with a primary right. (See *Miranda v. Shell Oil Co.* (1993) 17 Cal.App.4th 1651, 1658; 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, §§ 24-26, pp. 85-88.) Different legal theories may be pursued in aid of a single, primary right, but that does not create different or separate causes of action. (See *Slater v. Blackwood* (1975) 15 Cal.3d 791, 795-796; *Barrett v. Superior Court* (1990) 222 Cal.App.3d 1176, 1181-1182.) Nor does the pursuit of different remedies make different causes of action. (*Walton v. Walton* (1995) 31 Cal.App.4th 277, 291; *Verdier v. Verdier* (1962) 203 Cal.App.2d 724, 738.) The complaint is divided into nine separate claims, incorrectly denominated "Causes of Action." The complaint also utilizes the disfavored "chain letter" style of pleading whereby each purported cause of action incorporates by reference all prior causes of action. (*International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1179 (*Emigh*); *Kelly v. General Telephone Co.* (1982) 136 Cal.App.3d 278, 285.) The confusion engendered by this pleading practice is exacerbated by the fact that plaintiff's briefs are so structured as to obscure, rather than illuminate, the possible triable issues of fact by such means as totally ignoring the statements of undisputed fact, string-citing authorities without explaining their relevance and

otherwise putting the burden on the defendants and on this court to make some sense of the case.

In particular, it is a basic rule of appellate advocacy that the appellant bears the burden of presenting arguments that identify error and demonstrate resulting prejudice. (*Vaughn v. Jonas* (1948) 31 Cal.2d 586, 601; *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106 (*Paterno*).) The appellant's burden is met by providing the Court of Appeal an opening brief with a statement of the case and all of the cognizable issues for review. (Former Cal. Rules of Court, rule 13; *Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830-1831, fn. 4; *Landa v. Steinberg* (1932) 126 Cal.App. 324, 325.)

Former California Rules of Court, rule 15, in effect when the briefs were filed, required: "Each point in a brief shall appear separately under an appropriate heading, with subheadings if desired. Such headings . . . should be concise headings which are generally descriptive of the subject matter covered. The statement of any matter in the record shall be supported by appropriate reference to the record. . . ."

"It has been repeatedly held that, in order to comply with the requirements of the foregoing rule, appellant's assignments of error should take the form of propositions, which if sustained would lend substantial support to appellant's request for a reversal of the judgment of the lower court." (*Lady v. Worthingham* (1942) 55 Cal.App.2d 396, 397 [discussing predecessor of rule 15].)

Plaintiff ignores this rule. Nine of the twelve points in the opening brief are headed as follows: "Appellant Demonstrated Triable Issues of Material Fact as to [First, Second, Third, etc.] Cause of Action ([describing purported cause of action])." This form of heading does not describe a cognizable issue on appeal, because it is a conclusory proposition which provides no guidance as to the content of the argument. (*Lady v. Worthingham*, *supra*, 55 Cal.App.2d at p. 397; *Richard v. Richard* (1954) 123 Cal.App.2d 900, 902-903.) As defendants properly point out, this type of heading "is of zero value in explicating the contentions or theories upon which the appeal is based."

Plaintiff's protean pleading and briefing style makes it difficult to grasp his legal and factual points. By the time a case reaches the Court of Appeal, its contours should be clear. Plaintiff is delimited by the pleadings and the evidence adduced during the summary judgment proceedings. The disjointed and vague presentation of his claims on appeal cannot be excused by the fact that he was in pro per in the trial court: First, litigants who choose to represent themselves are not entitled to special treatment (*Doran v. Dreyer* (1956) 143 Cal.App.2d 289, 290); second, the operative complaint and all further papers in the trial court and on appeal were signed by attorneys. However, we do not believe that the irregular presentation of plaintiff's arguments, although confusing and unhelpful, is sufficiently egregious to warrant the extreme sanction of dismissing the appeal. (See 9 Witkin, *supra*, Appeal, § 631, p.

661, § 640, pp. 666-667.) We will ignore the defects, as there is no benefit to be gained by directing plaintiff to redo his briefs. (See Cal. Rules of Court, rule 14(e)(2)(C).)

We will address each point plaintiff properly raises as a basis for reversing the judgment, but we will not attempt to mirror the briefs, as that would be a wasteful endeavor.

SCOPE AND STANDARD OF REVIEW: SUMMARY JUDGMENT APPEALS

Our standard of review is de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 (*Aguilar*).)

Although the movant bears the burden of showing entitlement to summary judgment in the trial court, plaintiff cannot place on defendants the burden to defend the ensuing judgment: It remains plaintiff's burden, as the appellant, to show the judgment is wrong. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115-1116 [summary judgment case].) The only special break given to an appellant in a summary judgment case is that the facts are construed in his favor, as is done in the trial court. (*Aguilar*, *supra*, 25 Cal.4th at p. 843.)

Adding to the needless confusion in this case is the fact both parties disregard the separate statements of undisputed facts and the disputes raised thereon. Normally, the statements of undisputed facts are at the heart of a summary judgment appeal. "Separate statements are required not to satisfy a sadistic urge to torment lawyers, but rather . . . to permit trial courts to expeditiously review complex motions . . . ." (*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 335.) Because our role mirrors that of the trial court in

summary judgment cases, we, too, normally look to the separate statements to "expeditiously review" appeals following the grant of summary judgment, and writs following the denial of summary judgment. "'This is the Golden Rule of Summary Adjudication: if it is not set forth in the separate statement, *it does not exist*.'" (*Id.* at p. 337.) However, despite the fact both parties ignore the normal rules of appellate review of summary judgment motions, we are enjoined by the California Constitution not to reverse a judgment absent a miscarriage of justice. (Cal. Const., art. VI, § 13.) We proceed to the merits.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Operative Complaint

The operative pleading is the second amended complaint, which outlines the perimeter of materiality in our review following the order granting summary judgment. (See *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381.)

In August 1997, plaintiff was hired by Sierra Gaming Properties, LLC (Sierra Gaming), to manage a bingo parlor located within the City. For reasons not directly explained by the record, Sierra Gaming is not a party to this lawsuit, although the evidence shows plaintiff's wife continues to be employed by Sierra Gaming.

A condition of employment was that plaintiff secure a permit from the City pursuant to a local ordinance. In October 1997, plaintiff asked for a permit application at the Galt Police Department. Lieutenant Uptegrove, a defendant herein, gave plaintiff an application form. Plaintiff alleges this form

was designed for use by peace officer applicants and not gaming permit applicants. Plaintiff completed and returned this application to Uptegrove. One question on this form required plaintiff to disclose any arrests, regardless of whether those arrests resulted in convictions.

At the time of his application, plaintiff was under indictment for Cartwright Act violations by the California Attorney General, represented by Deputy Attorney General Mary Alden, now deceased. On his application, plaintiff truthfully answered that he was being prosecuted by the California Attorney General, based on charges that were the subject of a pending indictment. Plaintiff stated he had twice been arrested based on those charges.

The complaint alleges Uptegrove spoke with Alden about plaintiff's application and then, on or about November 12, 1997, Uptegrove told Sierra Gaming that plaintiff's application for a gaming permit had been denied because of the pending indictment. The next day, plaintiff was told by Sierra Gaming that the City had denied his application because of the pending indictment, and he was fired. Plaintiff filed his first complaint one year later, on November 13, 1998.

The first purported cause of action is captioned "Statutory Violations/failure to discharge mandatory statutory duties by Defendants." In this portion of the complaint, plaintiff alleges that defendants improperly sought information on the application regarding arrests which did not result in convictions, improperly disseminated this information without

plaintiff's consent, and denied his application for a gaming permit on the basis of improperly obtained arrest information. Within this portion of the complaint, plaintiff alleges that a City ordinance precludes soliciting or using such information in processing permit applications.

The second purported cause of action is captioned "Violations of Substantive and Procedural Due Process by defendants." Plaintiff alleges that defendants "unlawfully denied plaintiff's application for a permit; failed to properly notify plaintiff of the denial and basis therefor; failed to inform plaintiff of his right to appeal and be heard; failed to issue the permit notwithstanding a mandatory statutory duty to do so; and disseminated information which was unlawfully obtained and in violation of plaintiff's legal rights." This denied plaintiff the opportunity to earn a livelihood.

The third purported cause of action is for invasion of privacy by the solicitation of "private and embarrassing facts about plaintiff" and disseminating those facts without his consent as well as denying the permit on the basis of such facts. "Disclosure and use of this information concerning plaintiff was offensive and unlawful. As a result, plaintiff was scorned, abandoned by family and friends, exposed to contempt and ridicule, suffered loss of reputation and standing in the community, all of which caused him humiliation, embarrassment, mental anguish, and suffering, all to his general damage in a sum according to proof."

The fourth purported cause of action is captioned "Negligence per se/statutory violations by defendants." In part, this claim alleges, "It would have been foreseeable to any reasonably competent official that plaintiff would suffer irreparable injury if [defendants] made improper use of, or further disseminated, arrest information . . . unlawfully obtained from plaintiff." Part of this claim alleged that defendants negligently trained and supervised their agents regarding the processing and obtaining of confidential criminal history information.

The fifth purported cause of action is captioned "General Negligence" and reiterates prior allegations.

The sixth purported cause of action alleges "Negligent Supervision and Improper Training" as stated elsewhere in the complaint.

The seventh purported cause of action is captioned as one for "Intentional Infliction of Emotional Distress," based on the factual allegations made elsewhere.

The eighth purported cause of action is captioned as one for "Negligent Infliction of Emotional Distress," again without adding new factual detail.

The ninth purported cause of action alleges a "Violation of Federal Civil Rights Laws." This claim alleges that informational privacy rights were violated by defendants. This hurt plaintiff's right to earn a living.

A tenth cause of action was alleged against Alden but was later dismissed. Plaintiff's brief states that he is still suing her in federal court.

B. The Answer

The record contains the answer to the first amended complaint, which we assume was deemed to be an answer to the operative complaint. The answer denied plaintiff's allegations and pleaded various defenses, including statutory immunities and noncompliance with the Tort Claims Act.

C. The Summary Judgment Motion

Defendants' motion for summary judgment was based partly on plaintiff's refusal to testify concerning his disclosures to other people about his arrest and partly on the fact that his arrest and indictment were matters of common knowledge as they were reported in the Sacramento Bee and on various television programs. Defendants also alleged that the permit application had never been denied and that the City and its agents were not responsible for Sierra Gaming's decision to fire plaintiff. In his opening brief, plaintiff concedes the permit was never denied. To the extent the reply brief asserts there was a "de facto" denial, the argument is waived as it was not tendered in the opening brief. (*Kahn v. Wilson* (1898) 120 Cal. 643, 644.)

We pause to reject another theory raised by defendants. In the resume plaintiff submitted to Sierra Gaming, he omitted mention of the indictment and claimed he was a self-employed legal researcher. During the summary judgment proceedings it became clear he was referring to his pro per legal defense in

the criminal case. Contrary to a theory tendered by defendants in the trial court and pursued by them on appeal, Sierra Gaming officials would not concede this lie would disqualify plaintiff from working as a bingo manager. Nor, contrary to plaintiff's rosy assertion, did Sierra Gaming officials state the lie and the fact of the indictments were unimportant to them. But we address this point no further.

The following pertinent facts were adduced in the summary judgment papers.

Plaintiff without protest revealed his two arrests on the permit application. He revealed that in July 1994 the California Attorney General charged him with "conspiracy against trade & perjury. Charges dismissed in December 1994." Then, he was arrested in February 1995, "Indicted for the same charges. The indictment & the charges are still pending." This alerted Uptegrove to possible acts of moral turpitude (including perjury) and showed that the charges were pending.

On November 6, 1997, Uptegrove wrote a two-page memo to Police Chief Douglas Matthews (a defendant herein) summarizing the status of plaintiff's application. It states in part: "Mr. Beebe listed that on July 1994 he was charged with perjury for violations of bid rigging. He also stated in the application that these charges were dismissed. He again lists that in February 1995 he was indicted a second time for bid rigging apparently involving the same case." It detailed Uptegrove's understanding of the criminal charges, as related by Alden: She alleged a scheme by which Beebe fronted his small business

(Bayou Seafood) for use by a large business (Valley Foods), in order to take advantage of a program "to encourage small business[es] bid on State contracts." Uptegrove reported that Beebe had been indicted for three counts of perjury and later "with bid rigging claiming Valley Foods was using Bayou Foods as a cats paw." "Still pending against Mr. Beebe are the conspiracy against trade violations." The memo concludes the case was complicated "and it could be years before it is finally adjudicated." Apart from that case and the yet-to-be-received fingerprint clearance, there appeared to be no basis to deny the permit.

Uptegrove's view of the probable duration of the case proved to be accurate: The case was not over until finality of our decision upholding a dismissal, late in 2000. (*People v. Sherwin* (2000) 82 Cal.App.4th 1404.)

On November 26, 1997, Matthews asked whether plaintiff had been *convicted* of anything, and on December 1, 1997, Uptegrove replied in writing in part: "we will have to wait until Mr. Beebe's fingerprints come back before we can get the criminal history information. However, I confirmed today that Mr. Beebe is no longer employed with Sierra Gaming and consequently is no longer an applicant for the manager position. His application requires no further action by our department."

Sierra Gaming had fired plaintiff, effective November 13, 1997. The written reason was that he "[f]ailed to pass background check required by City of Galt. City of Galt therefore will not issue required Managers license."

The trial court granted summary judgment. After a judgment of dismissal was entered, plaintiff filed a timely notice of appeal.

DISCUSSION

As stated, we will not address plaintiff's claims in the order he presents, but will address them thematically.

I. PROCEDURAL CLAIMS

Plaintiff contends the summary judgment motion was defective. The trial court partly agreed that defendants "ignored" the rules governing summary judgment motions. Plaintiff claims: "The moving papers were very difficult to follow here because they did not track the pleaded claims, nor did respondents relate the isolated issues to any particular cause of action." He claims the defendants "isolate sub-issues in their brief on appeal and rarely relate them to any particular cause of action."

Defendants recognized, perhaps belatedly, that the various pleaded claims did not actually state different causes of action and instead sought to pare down plaintiff's claims thematically. But just as the trial court declined to deny the motion on this procedural ground, we decline to reverse the ensuing judgment. No where in plaintiff's opening brief does he argue that the defects in the motion caused prejudice. Assuming the facts set forth in the motion and responsive pleadings show that defendants are entitled to summary judgment, and absent any claim the defective presentation of the motion impaired plaintiff's ability to respond thereto, it does not matter

whether or not the motion was procedurally defective. We may not reverse a judgment for a pleading or procedural irregularity unless the appellant demonstrates a miscarriage of justice has taken place. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475; *Waller v. TJD, Inc.* (1992) 12 Cal.App.4th 830, 833.) And, absent an explicit argument that a procedural irregularity caused prejudice, an appellate court need not address the claim of error. (*Paterno*, *supra*, 74 Cal.App.4th at pp. 105-106.) The procedural claim is waived for failure to claim prejudice.

II. GALT ORDINANCE

Underpinning most of plaintiff's claims is the theory that the City wrongfully used a form which asked about arrests not resulting in conviction, and disseminated "such information concerning plaintiff after unlawfully obtaining it." The undisputed facts negate this predicate claim because, contrary to plaintiff's view, it was lawful for the City to ask plaintiff about pending criminal cases, and Uptegrove lawfully consulted with Alden about the pending criminal indictment. Contrary to plaintiff's view, he has no facts to show that defendants violated any mandatory duty regarding his permit.

Plaintiff makes a critical misstep regarding Lieutenant Uptegrove's duties as imposed by the City ordinance.

The existence and details of a local ordinance are factual questions. (*County of Colusa v. Charter* (1989) 208 Cal.App.3d 256, 262.) There is no dispute about the terms of the ordinance in this case. Once the details of an ordinance are shown, the normal rules of statutory construction apply. (*In the Matter of*

Yick Wo (1885) 68 Cal. 294, 303, revd. on other grounds *sub nom. Yick Wo v. Hopkins* (1886) 118 U.S. 356 [30 L.Ed. 220].)

Chapter 5.18 of the Galt Municipal Code, provides in part as follows, with particular portions emphasized:

> "[SECTION 1.] 5.18.010 Purpose. The regulatory provisions of this Chapter are necessary *to ensure that Bingo Parlors are operated subject to reasonable conditions for the protection of the public health, safety, and welfare*. A system of regulating Bingo Parlors, in conjunction with the existing regulations of organizations licensed to conduct Bingo in accordance with Chapter 5.16, encourages the maximum use of bingo proceeds for charitable purposes, but also *limits the commercialization of Bingo, particularly by criminal or otherwise undesirable elements*. . . . [¶] . . . [¶]
>
> "5.18.020 License Required. No person shall, unless under and by authority of a valid, unrevoked and unexpired Bingo Parlor License, operate a Bingo Parlor in the City . . . . [¶] . . . [¶]
>
> "5.18.035 Employee Permits. No person shall work in a Bingo Parlor as a bingo parlor manager, and no person who holds a Bingo Parlor license authorizing operations of a Bingo Parlor shall employ any person as bingo parlor manager, unless such person possesses a valid Employee Permit or a Bingo Parlor license issued pursuant to the provision of this Chapter.
>
> "5.18.040 Application for Permits. An application for an Employee Permit to serve as a bingo parlor manager shall contain a list of each arrest resulting in either a conviction, a plea of guilty or a plea of nolo contendere. The list shall, for each such conviction, plea of guilty or plea of nolo contendere, set forth the date of arrest, the offense charged and the offense for which the applicant was convicted, or entered a plea of guilty or a plea of nolo contendere.
>
> "5.18.050 Denial of Permits. Upon receipt of an application for an Employee permit to serve as a bingo

> parlor manager, the Chief of Police shall conduct an investigation as is deemed necessary. The Chief of Police shall issue the permit unless he or she finds any of the following and then only in accordance with the other provisions of this chapter and applicable law:
>
> "(a) The application [is incomplete];
>
> "(b) That the [application is inaccurate]; or
>
> "(c) That the applicant has been convicted of a crime and the time for appeal has elapsed . . .; or *has done any act involving dishonesty, fraud or deceit with intent to substantially benefit him or herself, or another, or substantially injure another, and the Chief of Police concludes that by reason of the crime or act the applicant would not perform his or her duties as a bingo parlor manager in a law-abiding manner or in a manner which does not subject patrons of the Bingo Parlor to risk of harm or criminal, deceitful or otherwise unethical practices*. [¶] . . .
>
> "SECTION 2. No Mandatory Duty of Care. This ordinance is not intended to and shall not be construed or given effect in a manner that imposes upon the City . . . a mandatory duty of care towards persons and property within or without the City so as to provide a basis of civil liability for damages, except as otherwise imposed by law."

To reiterate, the first sentence of section 5.18.040 provides: "An application for an Employee Permit to serve as a bingo parlor manager shall contain a list of each arrest resulting in either a conviction, a plea of guilty or a plea of nolo contendere." While it is true, as plaintiff alleges, that section 5.18.040 by its terms does not *require* an applicant to list arrests not resulting in conviction, neither does it forbid the listing of such arrests. It requires the listing of arrests resulting in convictions, and is silent as to other arrests.

However, section 5.18.050 requires the City (the Chief of Police) to "conduct an investigation as is deemed necessary," to ascertain whether the applicant "has done any act involving dishonesty, fraud or deceit," by virtue of which the Chief of Police concludes the applicant is unfit to work as a bingo parlor manager. This section by its terms refers to "any act," regardless of arrest or conviction.

Although plaintiff told the Chief of Police that the City could not use acts not resulting in conviction, the ordinance on its face allows a background investigation of "any act" which demonstrated unfitness. Defendants could investigate plaintiff's background to determine if he were trustworthy. When plaintiff admitted he had been arrested and that charges were still pending, it was permissible for Uptegrove to contact the relevant prosecutor to learn about plaintiff's character. Indeed, it is inconceivable that a background investigation could have been completed without checking with Alden in these circumstances.

III. MANDATORY DUTIES

Plaintiff suggests a violation of the ordinance would result in civil liability. Apart from our conclusion that asking plaintiff about all arrests was lawful under the ordinance, Section 2 of the ordinance states it does not impose any duty of care "so as to provide a basis of civil liability for damages, except as otherwise imposed by law." To the extent plaintiff reasons the ordinance sets forth some sort of mandatory duty, the violation of which supports government tort

liability under the Tort Claims Act (Gov. Code, § 815.6), the ordinance does not establish mandatory duties. Section 5.18.050 vests discretion in the Chief of Police to "conduct an investigation as is deemed necessary." The ordinance does not set any "mandatory" duty to conduct a particular type or depth of investigation, and therefore no civil liability can result because of the failure to adhere to some external standard as hypothesized by plaintiff. (See *Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 498-499 [duty must be obligatory, not discretionary]; *Walt Rankin & Associates, Inc. v. City of Murrieta* (2000) 84 Cal.App.4th 605, 628-629.)

IV. ARREST RECORD STATUTES

Plaintiff purports to find a violation of mandatory duties prescribed by *state law*, specifically Business and Professions Code section 461, which provides: "No public agency, state or local, shall, on an initial application form for any license, certificate or registration, ask for or require the applicant to reveal a record of arrest that did not result in a conviction or a plea of nolo contendere. A violation of this section is a misdemeanor. . . ."

Plaintiff reasons that a violation of this statute is negligence per se. (Evid. Code, § 669; see *Cheong v. Antablin* (1997) 16 Cal.4th 1063, 1076-1078 (conc. opn.).) Government Code section 815.6, part of the Tort Claims Act, generally applies the negligence-per-se doctrine to public entities. (*Alejo v. City of Alhambra* (1999) 75 Cal.App.4th 1180, 1185, fn. 3.)

There are several separate flaws in this claim.

First, the statute refers to an application for a "license, certificate or registration[.]" (Bus. & Prof., § 461.) Plaintiff did not apply for a bingo parlor *license*, as provided in section 5.18.20 of the ordinance, he applied for a bingo parlor manager *permit*, as provided in section 5.18.035. Plaintiff has not explained how a permit equates to a "license, certificate or registration." He does cite Business and Professions Code section 477, which defines "license" expansively, but that statute by its terms governs division 1.5 of that code; section 461 is in division 1 of that code. (See also Bus. & Prof. Code, §§ 119, 125.6.) Further, it applies to professions regulated "by this code." (*Id.*, § 477, subd. (b).) Bingo is not regulated by the Business and Professions Code. (Cf. *id.*, §§ 19800 et. seq. & esp. §§ 19821, 19825; Pen. Code, § 326.5 [Bus. & Prof. Code chapter regulates gaming but not bingo games].) Plaintiff has not demonstrated that all permit applications are governed by Business and Professions Code section 461. Interestingly, if (as plaintiff seems to assume) the types of gaming regulated by the Business and Professions Code included local bingo, plaintiff's theory would still fail because "arrests which did not result in conviction" *may be considered* for purposes of licensure for the types of gaming regulated by the Business and Professions Code. (Bus. & Prof., Code, § 19809.2.) This provision also undermines plaintiff's view that there is a public policy treating such arrest information as inherently private in all cases.

Second, Business and Professions Code section 461, when it does apply, forbids an entity to "ask for or require the applicant to reveal a record of arrest that did not result in a conviction or a plea of nolo contendere." This language does not address pending criminal cases, it speaks of "a record of arrest that *did not result* in a conviction." This language addresses arrests which have been resolved, not pending cases. A statute with very similar language, Labor Code section 432.7, limits the use by employers or prospective employers of "information concerning an arrest or detention that did not result in conviction" (see *Faria v. San Jacinto Unified School Dist.* (1996) 50 Cal.App.4th 1939, 1943-1944), and this language has been construed not to encompass pending cases, but only arrests (or detentions) which have been resolved and "did not result in conviction." (*Pitman v. City of Oakland* (1988) 197 Cal.App.3d 1037, 1044-1046.) We construe the similar language in the Business and Professions Code the same way.

Plaintiff points to Labor Code section 432.7, subdivision (g) which forbids peace officers to "knowingly disclose, with intent to affect a person's employment," information from "criminal offender record information maintained" by local law enforcement about "an arrest or detention or proceeding that did not result in conviction" to an unauthorized person. As stated elsewhere, the evidence was Uptegrove discussed the indictments with Sierra Gaming. The indicmtnets were not criminal offender data maintained by local law enforcement, but were documents publicly available at the Sacramento County Superior Court.

Plaintiff has produced no evidence of any evil motive on any defendant's part, that is, any improper "intent to affect" plaintiff's employment.

VI. PROCESSING THE APPLICATION

Plaintiff contends he raised triable issues of fact regarding his right to earn a living and the processing of his application. Most of the sub-arguments in this portion of the brief (as in much of the rest of the brief) consist of legal assertions followed by string-cites of authorities, with little or no attempt to explain how the legal principles apply to the facts of this case.

Plaintiff's second pleaded claim, for violation of due process interference with the "right to have [the] application considered in accordance with applicable law" lacks merit because no law was broken during the application process.

Plaintiff contends the City mishandled the denial of his permit. However, the evidence shows the permit was never actually denied. Instead, Uptegrove told Sierra Gaming the permit could not be issued pending resolution of the criminal charges, which would take a long time. Sierra Gaming then fired plaintiff and notified the City, which stopped processing the application as it was moot. Plaintiff never advised the City that he wished to pursue the application to a final decision and he never invoked any form of administrative remedy.

Plaintiff's recurring theme is he was an innocent businessman, falsely accused by the State and this false accusation was used to hound him and prevent him from earning a

lawful living. There is no support for this view in the record. The criminal charges against plaintiff did not result in an acquittal or finding of innocence, the charges were dismissed due to an illegal search, a finding upheld by this court. (*People v. Sherwin*, *supra*, 82 Cal.App.4th 1404.) This was years after Sierra Gaming fired plaintiff. Uptegrove had accurately told Sierra Gaming that resolution of the charges would take time and delay the permit, and Sierra Gaming made the choice to fire plaintiff rather than wait. As stated above, plaintiff had no evidence any defendant harbored malice toward him or was hounding him at the behest of the State.

Plaintiff could not seek damages for nonissuance of the permit. In the trial court he asserted that he "is not suing for damages based on the non-issuance of the permit[.]" In his reply brief he attempts to revive this claim. Defendants correctly point out he is now judicially estopped from claiming damages on a theory explicitly abandoned in the trial court. (*Emigh*, *supra*, 84 Cal.App.4th at pp. 1190-1191.) Plaintiff loses on the merits in any event.

Government Code sections 820.2 and 815.2 immunize the exercise of discretion vested in a public employee. (See *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 979-982 [tracing discretionary-act immunity before and after Tort Claims Act].)

More specifically, Government Code section 818.4 (§ 818.4) provides: "A public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any

permit, license, certificate, approval, order, or similar authorization where [the public entity or an employee of the public entity] is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked." Public employees, too, are immunized in such cases. (§ 821.2; see *Burchett v. City of Newport Beach* (1995) 33 Cal.App.4th 1472, 1480.)

Although these sections do not immunize the issuance or failure to issue a permit when such act is explicitly compelled (and, hence, "ministerial"), they immunize discretionary acts, such as the process of determining whether or not an applicant should be given a permit. (See *Morris v. County of Marin* (1977) 18 Cal.3d 901, 911-913 & fn. 7; *Colome v. State Athletic Com.* (1996) 47 Cal.App.4th 1444, 1454-1456; 1 Van Alstyne, Cal. Government Tort Liability (Cont.Ed.Bar 4th ed. 2001) General Principles, § 9.40, pp. 454-455; 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 141, p. 223.) Even if defendants made mistakes in processing the application, immunity covers the whole of an activity, not just activities properly performed. (See *Rosenthal v. Vogt* (1991) 229 Cal.App.3d 69, 75.)

For example, an applicant for admission to the State Bar of California must demonstrate moral fitness. In a case alleging the State Bar and its employees negligently delayed the moral fitness examination, section 818.4 immunized the alleged misconduct. (*Engel v. McCloskey* (1979) 92 Cal.App.3d 870, 880-881, approved on this point in *Nunn v. State of California*

(1984) 35 Cal.3d 616, 623; see *Thompson v. City of Lake Elsinore* (1993) 18 Cal.App.4th 49.)

In *State of California v. Superior Court* (1984) 150 Cal.App.3d 848, we held that where a statute commands an investigation, the scope and manner of the investigation is discretionary. There, the failure to *revoke* a license was immunized, even assuming such failure proximately caused damages of the kind sought to be avoided by the statute that authorized or commanded the investigation. (*Id.* at pp. 857-859 & fn. 8.)

In a leading case applying section 818.4 to the decision whether to issue a building permit, we commented on the hypothetical case where officials negligently or otherwise improperly fail to act on an application: "If, in denying [the permit application], the city and its hierarchy of officials, had acted negligently or had otherwise erred——for whatever reason——the remedy of mandamus existed. Instead, Burns was wholly preoccupied with monetary remuneration, including punitive damages. He did not even wait to exhaust the administrative remedies available to him under city ordinance." (*Burns v. City Council* (1973) 31 Cal.App.3d 999, 1005.)

Thus, although plaintiff at times disavows liability based on denial of the permit, or delayed issuance, he also loses to the extent he bases liability on a delayed or flawed investigation. He is barred by the immunity provided by sections 818.4 and 821.2. If he thought the form presented to apply for the bingo manager permit violated state law or the

City ordinance, his remedy was a mandamus action to compel the City to implement the ordinance in a lawful manner.

As stated elsewhere, the existence of the indictments and the allegations about plaintiff's participation in a scheme to defraud the state through bid rigging were matters of public knowledge, and had been the subject of newspaper and television reportage. It was the *indictment*, which concerned Uptegrove during the application process, not the *arrest*. Defendants tendered as an undisputed fact (No. 32) that Uptegrove "told Kevin Beers of Sierra Gaming that due to the indictments pending" the permit could not as yet be issued and that "when Beers asked what the indictment was for, [Uptegrove] said a violation of the Cartwright Act, price fixing and bid rigging." Plaintiff's purported dispute did not in fact dispute this tendered fact, which shows Uptegrove did not tell Sierra Gaming anything it could not have found out on its own, as could any member of the public. That the City officials refused to certify plaintiff was of good moral character until the pending criminal case was resolved was a decision well within their discretion. The permit was never denied and it was *Beers*, a Sierra Gaming employee, who suggested that Sierra Gaming fire plaintiff because it would take "too long" to wait for the criminal charges to be resolved or appeal from the denial of the permit, if it was denied. Plaintiff did not dispute that he "never requested the City to give him an opportunity to present his side on the permit issue," because he had been fired and his position had been filled.

On appeal, plaintiff repeatedly faults defendants for not continuing to process his application after he was fired. Defendants viewed the application as moot once it learned plaintiff had been fired. Plaintiff never told the City that he wanted to pursue the permit after he was fired. In such circumstances, it appears he does not want a permit, he wants a lawsuit. (See *Burns v. City Council, supra,* 31 Cal.App.3d at p. 1005.) Continuing to investigate plaintiff's background would be a waste of law enforcement resources. "The law neither does nor requires idle acts." (Civ. Code, § 3532; see *Adams v. Southern Pacific Co.* (1928) 204 Cal. 63, 68 [investigation not required].) By the evident futility of processing the permit and by plaintiff's failure to press the point, we conclude he has not demonstrated breach of any mandatory duty.

Plaintiff contends he inquired about the status of his application. The record citations supplied show that on the day he was fired, plaintiff called Uptegrove and left a message ("to call me back as soon as possible since it was very important, and I needed to talk to him") but that Uptegrove did not call back. Then, 11 months later, just before filing this lawsuit, he spoke with Matthews about his application, during a conversation on other matters. He correctly asserted that the City officials assumed he was not interested in the application because he had been fired, although he had not explicitly withdrawn the application. The cited evidence does not show that plaintiff told the City that he wanted the City to continue

processing the permit application despite the fact that plaintiff had no use for it after Sierra Gaming fired him.

Plaintiff relies on various procedural provisions relating to licenses (and arguably permits) regulated by the Business and Professions Code. (Bus. & Prof. Code, §§ 480, 484-490.) In particular, he points to a section prohibiting the denial of a license for poor moral character. (*Id.*, § 475, subd. (c).) These provisions have no application to this case, because they do not apply to the City. They apply to applications for a license or a "certificate, registration or other means to engage in a business or profession regulated by this code." (See *id.*, § 477, subd. (b).) As we have stated above, local bingo is not regulated by the Business and Professions Code. For those businesses which are regulated, one possible ground for denial of a license is commission "of any act involving dishonesty, fraud or deceit with the intent to substantially benefit" the person, language which tracks the City ordinance. (*Id.*, §§ 475, subd. (a)(3), 480, subd. (a)(2).) This undermines plaintiff's view that there is a public policy to the effect that dishonest acts not resulting in a criminal conviction are inherently private and cannot be delved into.

We note that precedent holds there is no right to sue for money damages for violation of state due process rights. (*Bradley v. Medical Board* (1997) 56 Cal.App.4th 445, 462-463.) That issue is now pending in the California Supreme Court, in *Katzberg v. Regents of the U.C.*, formerly at 88 Cal.App.4th 147.

VII. PRIVACY

Plaintiff contends he has raised triable issues of fact to show an invasion of privacy rights protected by statutes and the California Constitution. (Cal. Const., art. I, § 1.) Plaintiff reiterates claims regarding statutes we have addressed, and the claims fail for the reasons stated.

Plaintiff's reliance on *Loder v. Municipal Court* (1976) 17 Cal.3d 859, and cases following that decision, does not advance his claim. That case addressed the California Constitution's privacy provision as it relates to information about nonconviction arrests where the cases are *completed*, and did not address the use of pending cases. Further, the California Supreme Court stated that "the suspect's right of privacy is not violated by prompt and accurate public reporting of the facts and circumstances of his arrest[.]" (*Id.* at p. 865.) Further, information about an arrest "may under appropriate conditions be a valuable investigative tool for the discovery of further evidence. Often the prior arrest is not an isolated event . . . . This is especially true when the crime in question is typically subject to recidivism, such as . . . confidence frauds . . . ." (*Ibid.*) This dovetails with the reason Uptegrove was concerned about the indictments alleging a form of fraud and perjury: The Galt ordinance was designed to keep criminals out of the bingo business, to make sure no fraud takes place.

To the extent plaintiff might base the privacy claim on common-law principles, he has no such cause of action on these facts. This is not a case of publication of private, truthful,

facts, where a person's past is revealed in circumstances which may trigger tort relief, e.g., violation of the "'right to be let alone.'" (*Melvin v. Reid* (1931) 112 Cal.App. 285, 289, cited on this point, *Kapellas v. Kofman* (1969) 1 Cal.3d 20, 35. See *Briscoe v. Reader's Digest Association, Inc.* (1971) 4 Cal.3d 529.) Here, plaintiff placed his good character at issue by applying for the gaming permit. (See *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 26 [privacy waived by voluntary exposure].) Defendants did not dredge up settled issues of plaintiff's past. (Cf. *Forsher v. Bugliosi* (1980) 26 Cal.3d 792, 810-813 [publicity may impede rehabilitation of criminals].) The fact of the indictment had been recently broadcast in the media and was not in any way private. (See *Kapellas v. Kofman*, *supra*, 1 Cal.3d at p. 38 [disclosure of items "recorded on the Alameda police blotter; such events would already have been matters of public record"]; *Alarcon v. Murphy* (1988) 201 Cal.App.3d 1, 5-7 [disclosure of arrest records does not generally violate state privacy right, fact that police believed plaintiff to be a murderer was a matter of record and sharing that information with public was not tortious].) Moreover, such tort requires dissemination to a large number of people. (*Kinsey v. Macur* (1980) 107 Cal.App.3d 265, 270-272.) Here, the allegation is defendants told plaintiff's employer. That is not enough. (See *Porten v. University of San Francisco* (1976) 64 Cal.App.3d 825, 828 [disclosure of school transcript to scholarship commission "was not a communication to the public in general or to a large number of persons"].)

VIII. CRIMINAL HISTORY DATA

Plaintiff's reliance on the purported dissemination of "state summary criminal history information," as described in Penal Code section 11105, also fails to help. That history "means the master record of information" maintained by the Attorney General, such as anthropometric data, fingerprints and modus operandi cards, as well as arrest and conviction information. (Pen. Code, §§ 11100, 11102, 11103, 11105, subd. (a)(2)(A); see *Central Valley Chap. 7th Step Foundation v. Younger* (1979) 95 Cal.App.3d 212, 223-226 [describing statutes, including referenced provision of Labor Code allowing employers to ask about pending cases].) Alden violated no law in discussing the charges with Uptegrove, as he was authorized to access the history as part of his investigation. (Cf. Pen. Code, §§ 11105, subd. (b)(2)(10), 11141 [misdemeanor to give criminal history to unauthorized person].)

If Uptegrove "furnishe[d] the record or information to a person who is not authorized" he would have committed a misdemeanor. (Pen. Code, § 11142; see *Loder v. Municipal Court*, *supra*, 17 Cal.3d at pp. 872-873.) Labor Code section 432.7, subdivision (c) appears to provide that violation of this statute (by anyone, not just employers) gives rise to a civil action. But the undisputed facts show Uptegrove told Sierra Gaming about the *indictments*, which were public knowledge and which he learned about from plaintiff's application, not from material furnished by Alden. Information already known does not become confidential merely because it is also contained in

confidential documents. (See *Kilgore v. Younger* (1982) 30 Cal.3d 770, 780-781.)

Plaintiff cannot rely on Labor Code section 432.7, subdivision (g), which forbids peace officers to disclose certain local information about "an arrest or detention or proceeding that did not result in conviction" to unauthorized persons. Plaintiff has no evidence Uptegrove revealed confidential local arrest information as opposed to indictment information. Further, as stated above, the statute applies to completed cases, not pending cases. (*Pitman v. City of Oakland*, *supra*, 197 Cal.App.3d at pp. 1044-1046.)

Plaintiff asserts that Uptegrove improperly accessed "CLETS," the California Law Enforcement Telecommunications System, by claiming he was conducting a fraud investigation. CLETS is set forth in Government Code section 15150 et seq. (See *People v. Martinez* (2000) 22 Cal.4th 106, 1121-125 [describing history of various pertinent statutes].) It is "a statewide telecommunications system of communication for the use of law enforcement agencies." (Gov. Code, § 15152.) Asserting that CLETS could not be used for a bingo permit background check, plaintiff reasons: "Had the correct application form been used and had [Uptegrove] refrained from improperly accessing CLETS," plaintiff would have been cleared to receive the permit, because his fingerprint card ultimately came back marked "no criminal history."

Plaintiff points to state regulations governing use of "criminal offender record information." (Cal. Code Regs., tit.

11, § 701 et seq.) He also points to a declaration filed by Severa Wilford, an information manager with the California Department of Justice, with authority over the CLETS system. In addition to giving a legal opinion on the permissible use of CLETS (to which the trial court largely sustained defense objections), Wilford declared that on November 6, 1997, plaintiff's criminal record was accessed "and the purpose of the inquiry was noted as 'Fraud Invst. Lt. Uptegrove.'" Plaintiff mistakenly states that Wilford declared "that respondent UPTEGROVE had accessed BEEBE's criminal history record" but Wilford did not so declare. Wilford further gave a legal opinion (again, to which the trial court sustained objections) that if this inquiry were for a bingo manager permit, the inquiry was improper. Wilford also declared that police agencies are instructed not to use CLETS for licensing matters, and the trial court overruled defense objection to this part of the Wilford declaration.

Plaintiff attached to the operative complaint copies of the government tort claims he filed with the City and State. As stated above, defendants in part asserted the complaint failed to conform to the Tort Claims Act. The State tort claim alleges that Alden "released non-conviction information" in a telephone call with Uptegrove, who told Kevin Beers the City "was denying Mr. Beebe's application. The sole reason given by Lt. Uptegrove was the pending indictment against Mr. Beebe. This pending indictment was the subject of the aforementioned telephone conversation between Lt. Uptegrove and Deputy Attorney General

Alden." There is no mention of accessing the CLETS database, although in an attachment Plaintiff provided a laundry list of statutes allegedly violated, including the federal Civil Rights Act, Labor Code section 432.7, Business and Professions Code section 475 et seq. and "Penal Code §§ 11105, 11140-11144, 13300[.]" The City tort claim alleges Uptegrove "discussed the pending indictment" with Alden, which allegedly breached "a mandatory duty not to use non-conviction information to deny Mr. Beebe's application[.]" There is no mention of accessing CLETS in this claim, which also lists the same statutes allegedly violated as the state claim, as well as the Galt ordinance.

The cited statutes govern "'State summary criminal history information'" which "means the master record of information compiled by the Attorney General" but does not include "records of complaints to or investigations conducted by" the Attorney General. (Pen. Code, §§ 11105, subd. (a)(2)(A) & (B), 11140.) Uptegrove's act of speaking with Alden about pending indictments is not the same as dissemination of "the master record of information" maintained on persons by the Attorney General.

Uptegrove's act of speaking with Alden is also distinct from his alleged act of accessing CLETS (properly or otherwise). Uptegrove denied accessing CLETS, and the City maintains the Wilford declaration does not show that he did, but we need not resolve that issue. Where a civil suit against a public entity alleges discrete factual theories of recovery, it must be supported by a tort claim outlining facts supporting each distinct theory: The civil suit may not materially vary from

the tort claim. (See *Fall River Joint Unified School Dist. v. Superior Court* (1988) 206 Cal.App.3d 431, 434-435; 1 Van Alstyne, *supra*, Overview of Claim Procedures, § 5:15, pp. 162-165 ["variance defense" can be used on summary judgment].)

Therefore, plaintiff cannot raise a triable issue of fact about CLETS: Because the claimed misuse of the CLETS database was not asserted in the tort claims it is irrelevant to this suit. (See *FPI Development, Inc. v. Nakashima*, *supra*, 231 Cal.App.3d at p. 381.)

Moreover, as stated above, plaintiff fails to show any information Uptegrove disclosed to Sierra Gaming was beyond that available from the public record, as opposed to information from CLETS itself. Uptegrove testified in deposition that he never told Beers the application was denied, and Beers testified in deposition to the effect that he understood the permit could not be issued because of the pending *indictment*. Beebe testified in deposition that Uptegrove told him he (Uptegrove) had spoken to Alden "about the indictment and had discussed the specifics regarding the criminal charges," but not that they had discussed the *arrests*. Uptegrove did not learn about the indictment from CLETS, he learned about it from plaintiff. Contrary to an assertion by plaintiff there was no showing that CLETS (if accessed improperly or otherwise) revealed any information at all about Beebe.

As the trial court properly held: "There is no evidence that any defendant gave to Beers information obtained from the summary criminal history information as defined in Penal Code

section 11105. As the prosecuting attorney, Alden's information necessarily came from her involvement in the case. The fact that similar information may have also been contained within the database does not establish a violation of this statutory scheme protecting criminal history records. Therefore, the dispute over whether Uptegrove accessed the database after speaking with Alden is immaterial." As we stated above, information already known does not become confidential merely because it is also contained in confidential documents. (See *Kilgore v. Younger*, *supra*, 30 Cal.3d at pp. 780-781.)

Plaintiff also asserts "Courts have consistently recognized that release of arrest records or dissemination of information about those arrests implicates privacy rights."

Here, plaintiff voluntarily disclosed his arrests. He chose to work in a job which required a permit obtainable only upon a showing of good character. The pending indictments were matters of public record. It was not the *arrests* which influenced Uptegrove's conduct, but the pending, public, criminal charges. Plaintiff fails to explain how sharing publicly available information such as a pending indictment violates the state constitutional right of privacy, and we will not make the argument for him.

IX. EMOTIONAL DISTRESS

The complaint is also framed in terms of intentional and negligent infliction of emotional distress.

The tort of intentional infliction of emotional distress requires "extreme and outrageous" conduct beyond the bounds

normally tolerated in a civilized community, done with the intention of causing emotional harm, or with reckless disregard for such consequences, which causes severe or extreme emotional distress. (*Cervantes v. J.C. Penney Co.* (1979) 24 Cal.3d 579, 593.) As we have stated before (assuming emotional distress and causation have been proven): "Generally, conduct will be found to be actionable where the 'recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"' (Rest.2d Torts, § 46, com. d.)" (*KOVR-TV, Inc. v. Superior Court* (1995) 31 Cal.App.4th 1023, 1028.)

Plaintiff's brief hinges this contention on his various theories we have rejected elsewhere in this opinion. Plaintiff's failure to show any defendant had actual malice, or that any violation of law occurred in connection with his permit application, defeats this theory of liability.

Plaintiff cursorily asserts his claim of negligent infliction of emotional distress is viable, incorporating points made elsewhere. This is not a separate tort, but a species of negligence. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1072.) We reject the claim for lack of citation to authority or coherent legal analysis. (*People v. Gidney* (1937) 10 Cal.2d 138, 142-143.)

X. FEDERAL CIVIL RIGHTS

Plaintiff contends there are triable issues as to his claim of civil rights violation (42 U.S.C.A. § 1983).

Plaintiff concedes the government officials had discretion regarding whether to grant or deny the application, but asserts there was "no discretion to allow illegally obtained information to influence the process, nor did they have discretion to deny or pigeonhole the application because a criminal indictment was pending against this applicant." Plaintiff has not shown any illegally-acquired information was used during the permit process, and has not shown the permit was denied or "pigeonhole[d]" after he was fired, for the reasons stated.

Plaintiff did not have a federally protectible interest in securing the permit. First, he has not shown the permit procedures were illegally implemented, for the reasons stated. Second, the denial of a license is not a per se violation of federal civil rights, even if procedural irregularity occurs. (*Jacobson v. Hannifin* (9th Cir. 1980) 627 F.2d 177, 180.)

Plaintiff appears to urge that his Fourth Amendment rights have been violated, but he fails to flesh this point out with argument or authority and therefore it is waived. (*People v. Gidney*, *supra*, 10 Cal.2d at pp. 142-143.)

To the extent plaintiff's briefs can be read to allege a violation of his federal civil rights by the dissemination of information about arrests which have not yet been resolved in court, no such federal privacy right exists. The United States Supreme Court rejected a similar claim in *Paul v. Davis* (1976) 424 U.S. 693 [47 L.Ed.2d 405].

XI. EVIDENTIARY OBJECTIONS

Plaintiff asserts the trial court wrongly sustained objections to part of the declaration of Severa Wilford. The argument is waived because it is unintelligible and unsupported by citation to authority. (*People v. Gidney*, *supra*, 10 Cal.2d at pp. 142-143.) Further, for the reasons stated elsewhere, accessing the CLETS system was not embraced by the tort claims and therefore is irrelevant to this lawsuit.

XII. JUDGMENT OF DISMISSAL

Plaintiff contends a judgment of dismissal should not have been entered because there are triable issues of fact. We disagree for the reasons stated above.

XIII. WRONGFUL INTERFERENCE

In the reply brief, plaintiff makes arguments regarding a purported claim for damages based on interference with contract or prospective economic advantage. No such theory is outlined in the complaint, nor was such a theory asserted in the opening brief, therefore it is waived. (*Kahn v. Wilson*, *supra*, 120 Cal. at p. 644.)

DISPOSITION

The judgment is affirmed. Plaintiff shall pay defendants their costs of this appeal. (Cal. Rules of Court, rule 26.)

MORRISON, J.

We concur:

DAVIS, Acting P.J.

NICHOLSON, J.